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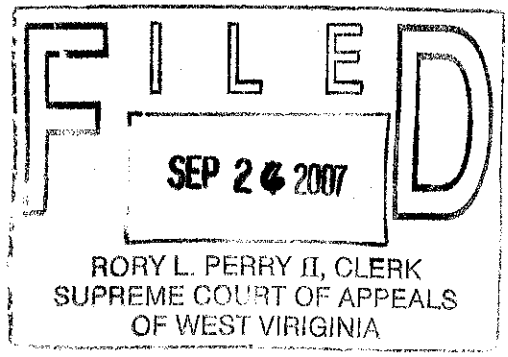
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
AT CHARLESTON



GREGORY J. MUTO, by
his Administrator and next friend,
LINDA MUTO, and
LINDA MUTO, his widow,
Plaintiffs,

S. Ct. No. 33506
Grant Co. Civil Case No. 06-C-51

v.

LARRY SCOTT, individually,
and
LARRY SCOTT, LTD. CO
and
LARADO CONSTRUCTION SALES, LLC.
and JOHN DOE CONTRACTORS,
ARCHITECTS, CONSULTANTS,
DESIGNERS AND ENGINEERS,
for: concrete work, construction, design
installation, excavation, and other aspects of
building and construction.
Defendants.

REPLY OF PLAINTIFF GREGORY J. MUTO TO BRIEF OF DEFENDANT LARRY SCOTT, INDIVIDUALLY AND L. SCOTT LTD. CO. AND LARADO CONSTRUCTION SALES, LLC.

JULIE GOWER ROMAIN
WV STATE BAR ID #5544
211 ADAMS STREET, SUITE 600
FAIRMONT, WV. 26554

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L. SCOTT LTD. CO. AND LARADO CONSTRUCTION SALES, LLC.

ISSUE: Whether, where Plaintiff originally filed her Complaint against John Doe contractors, architects, consultants, designers and engineers for concrete work, construction, design, installation, excavation, and other aspects of building and construction during the two years following injuries Gregory Muto received as a

direct result of the improvement of real property, and thereafter amended her Complaint prior to any Answer by a Defendant, and within one hundred twenty days of filing of the same, to include a specific Defendant who was a contractor for the construction and design of the improvement, the Plaintiff's claims are barred by the two-year statute of limitations for personal injury or are timely made pursuant to the ten-year statute of repose set forth in West Virginia Code § 55-2-6a.

PROCEDURAL HISTORY

Linda Muto filed her Complaint in this action on June 28, 2006, setting forth claims against John Doe Defendants described as contractors, architects, consultants, designers and engineers for concrete work, construction, design, installation, excavation, and other aspects of building and construction. Thereafter, Plaintiff identified Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC as additional defendants. Plaintiff amended her Complaint, adding Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC as additional Defendants, and retaining the John Doe Defendants, all prior to any service upon or Answer filed by a Defendant. (See Amended Complaint) Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC were served with the Amended Complaint within one hundred twenty (120) days of the filing of the original Complaint.(See Return of Service) Defendants filed their Motion To

Dismiss made pursuant to *West Virginia Rule of Civil Procedure* Rule 12(b)(6) with the Circuit Court of Grant County. The Circuit Court of Grant County Granted Defendants' Motion to Dismiss, applying the two-year statute of limitations for personal injury actions and finding that the Defendant had no notice of the filing of the Complaint within the two-year period following Plaintiffs' injuries. Plaintiff Linda Muto, the widow and Administrator of the estate of Plaintiff Gregory Muto timely filed her Petition for Appeal in this case on May 18, 2007. By Order entered July 10, 2007, the Court granted her Petition for Appeal. On August 9th, 2007, Linda Muto submitted her Brief in support of her Petition. On September 10th, 2007 Defendants filed their Brief in response to Plaintiff's. Plaintiff now submits her Reply to the Brief of Defendants.

STATEMENT OF THE CASE

Plaintiff Gregory Muto, now deceased, and his wife, Linda Muto, were visitors at Smoke Hole Cabins on July 4, 2004. At that time, Smoke Hole Cabins, located in Grant County, West Virginia, was undergoing improvements and renovation and a ditch or canal, over six feet deep, over one hundred yards long, and bisecting the Smoke Hole Cabins property, was located on the premises. The said canal was ground level, unlit, and unenclosed, with no barriers or warnings. One

bridge, lit only by the porch lights from cabins some twenty feet away, crossed the canal. Gregory Muto fell into the canal while attempting to cross the Smoke Hole Cabins property during the nighttime hours to visit friends in another cabin and suffered serious injury as a result.

On February 20, 2006, Plaintiff filed her claim for negligence against Smoke Hole Cabins in Grant County Circuit Court Case No. 06-C-10. The Defendant in that matter was unwilling to provide pre-discovery identification of the contractors who had worked on, or were responsible for, the construction, design and condition of the canal. Plaintiff therefore filed her John Doe Complaint in the instant case on June 28, 2006 and within the two-year statute of limitations for personal injury tort actions. Thereafter Plaintiff, within five days of receipt of discovery responses identifying the Defendants Larry Scott, Larry Scott LTD. Co. and Laredo Construction Sales, LLC, as the persons or entities responsible for portions of the design, planning or construction of the canal, and prior to any Answer or response by a Defendant, amended her Complaint in the instant case to add the Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC. The Defendants were served with the Amended Complaint on October 3, 2006, and within the statutory 120 day period set by West Virginia Rule of Civil Procedure Rule 4(k).

Defendants thereafter filed their Motion To Dismiss, moving the Court to dismiss Plaintiff's Amended Complaint on two grounds. First, Defendants argued that they had no notice of Plaintiff's claim within the two-year statute of limitations period applicable to torts and therefore, Plaintiff did not meet her burden for amendment of the Complaint under West Virginia Rule of Civil Procedure Rule 15(c). Secondly, Defendants argued that because they had no notice of the Plaintiff's claims within the two-year limitations period for personal injury claims, then dismissal pursuant to West Virginia Rule of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief may be granted applied.

Following oral argument held on January 9, 2007, the Circuit Court of Grant County, in its Order dated January 11, 2007, applied the four-prong test set forth in Syllabus Point 4, Brooks v. Isinghood, 213, W.Va. 675; 584 S. E. 2d 531 (2003) and found that: (1) Plaintiff had asserted claims in her Amended Complaint identical to those set forth in the original Complaint; (2) Defendant did not receive notice of the filing of the original Complaint until served with the Amended Complaint; (3) The Defendants did not know that they would have been named in the original Complaint but for a mistake on the part of Plaintiff; and (4) Defendants had notice of the case during the period provided for service of the Complaint and they should have been named as Defendants within the statutory period for filing of

the original Complaint. The Court granted Defendants' Motion to Dismiss pursuant to Rule 12 (b)(6), finding that Plaintiff has made no mistake of fact or law in the filing of their original Complaint and had therefore not met her burden for relation back of amendments pursuant to West Virginia Rule of Civil Procedure Rule 15(c)(3). (See ORDER GRANTING DEFENDANTS' MOTION TO DISMISS) Plaintiff appealed the ORDER of the Circuit Court of Grant County on the basis that Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC were timely served with the Amended Complaint within the applicable ten-year statute of repose applicable to contractors and designers making improvements to real property.

STANDARD OF REVIEW

The Court's review of an order granting a motion to dismiss a complaint is de novo. "It is well-established that, "Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770; 461 S.E.2d 516 (1995). Syl. pt. 1, Bradshaw v. Soulsby, 210 W.Va. 682; 558 S.E.2d 681 (2001)." Syllabus Point 1, King v. Heffernan, 214 W.Va. 835; 591 S.E.2d 761 (2003). This Court has also held that, "Where the issue on an appeal from the circuit court is clearly a, question of law or involving an interpretation of a statute, we apply a de novo

standard of review." Syllabus Point 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138; 459 S.E.2d 415 (1995)." Roy v. D'Amato, 218 W. Va. 692; 629 S. E. 2d 751 (2006).

ARGUMENT

The issue involved in this appeal is whether amendment of a Complaint is timely made when certain Defendants were identified as "John Doe" in the original Complaint, additional named and identified Defendants were added in the amendment of the Complaint, made prior to the expiration of the 120 days for service of the original Complaint, and prior to filing of any Answer, and the harm or injury resulted from the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property or the defective or unsafe condition of any improvement to real property, which is subject to a ten-year statute of repose. Plaintiff has argued in her Brief in support of this appeal that West Virginia Code § 55-2-6a permits her to bring her action within ten years of Gregory Muto's injury sustained as a result of the improvement to real property. Defendant argues that West Virginia Code § 55-2-6a. does not permit Plaintiff to file her claim for personal injuries against a Defendant engaged in the improvement of real property within ten years following the completion of said improvements, but rather, that West Virginia Code § 55-2-6a stands for the premise that after ten years following completion of the improvements to real

property, a person or entity making such improvements may not be included as a defendant in an action for personal injuries sustained as a result of such improvements. However the Defendant also writes, in its Brief in response to that of Plaintiffs, at page 5, that "Code Section 55-2-6a provides that a person may bring suit for damages for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvements to real property within ten years after the performance or furnishing of such services or construction." Although Defendant appears to agree with the Plaintiff's position regarding Code Section 55-2-6a, Plaintiff doubts that was the Defendant's intent.

First, Plaintiff contends that the portions of this Court's prior rulings which hold that "pre-existing statute of limitations for both contract and tort actions continued to operate within the outside limits set by the statute" means exactly what it says. Thomas v. Gray Lumber Company. 199 W.Va. 556,563; 486 S.E. 2d 142,149 (1997) (per curiam) (citing Gibson v. West Virginia Department of Highways, 185 W.Va. 214; 406 S.E. 2d 440 (1991) and Shirkey v. Mackey, 184 W.Va. 157; 339 S. E. 2d 868 (1990). The "outside limits set by the statute" would indicate that the claims of an injured party must be brought within the outside limits, or not before the end of the ten year period in which architects and contractors may be held liable for defects in the improvements to real property. Plaintiff further

suggests however, that perhaps West Virginia Code § 55-2-6a is confusing in its wording. First, West Virginia Code § 55-2-6a provides that it represents a "period of limitation". " The period of limitation provided in this section shall not commence until the improvement to the real property in question has been occupied or accepted by the owner of real property, whichever comes first" *West Virginia Code § 55-2-6a.* A statute of limitation is a statute setting forth the maximum period of time, after certain events, that legal proceedings based upon those events may begin. A statute of repose, in contrast to a statute of limitation, is designed to bar actions after a specified period of time has run from the occurrence of some event other than the injury which gave rise to the claim. The Courts, not unlike West Virginia Code § 55-2-6a, have at times labeled West Virginia Code § 55-2-6a as a statute of limitation. "While we leave to another day the further definition of "reasonable length of time" within the context of a Sewell type case, we hold that an action for the negligent planning and design of an access road to lead from a business location to a highway, with resulting encroachment on the public way, is subject to the limitation of actions provisions of W.Va. Code § 55-2-6a." Louk v. Isuzu Motors, 198 W. Va. 250, 260; 479 S. E. 2d 911,921 (1996). "...(W)e must find that the ten-year statute of limitations in § 55-2-6a (1988) does not apply in an action for damages against a manufacturer of allegedly defective construction materials." Basham v. Shale, 180 W.Va. 526,529; 377 S.E. 2d 830 (1988). "The

Court notes that W.Va.Code § 55-2-6a establishes a separate limitations period for defects in builder's construction of improvements on real property." Thomas v. Gray Lumber Co., 199 W. Va 556, 563; 486 S. E. 2d 142 (1997). Therefore, if the Plaintiff is correct in her reliance upon the language of the Code and some of this Court's prior opinions, then the Plaintiff has brought her action against the Defendant within the applicable statute of limitations. If however, the Defendant is correct that W.Va.Code § 55-2-6a represents only period of time after which an improver of real property may not be held liable, the Plaintiff has made a mistake of law.

Defendant argues that West Virginia Rule of Civil Procedure, Rule 15(c) applies to the amendment of Plaintiffs' Complaint.

"Under Rule 15(c)(3), an amendment to a complaint changing a defendant or the naming of a defendant will relate back to the date the plaintiff filed the original complaint if: (1) the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint; (2) the defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named; (3) the defendant either knew or should have known that he or she would have been named in the original complaint had it not been for a mistake; and (4) notice of the action, and knowledge or potential knowledge of the mistake, was received by the defendant within the period prescribed for commencing an action and service of process of the original complaint."
Brooks v. Isinghood, 213 W. Va. 675, 685; 584 S. E. 2d 531, 541 (2003) ; Elam v. Med. Assurance of W.Va. Inc., 216 W. Va. 459, 464; 607 S.E. 2d 788,793 (2004)

(per curiam) Defendant argues that Plaintiff has failed to meet the third requirement above, that the Plaintiff was laboring under a mistake which caused her to fail to properly join a defendant due to a mistake. (See Brief of Defendants, page 8).

If Plaintiff has made a mistake of law, then she has met the third requirement for relation back under the *Brooks* and *Elam* holdings. "(U)nder Rule 15(c)(3)(B), a "mistake concerning the identity of the proper party" can include a mistake by a plaintiff of either law or fact, so long as the plaintiffs mistake resulted in a failure to identify, and assert a claim against, the proper defendant. A court considering whether a mistake has occurred should focus on whether the failure to include the proper defendant was an error and not a deliberate strategy." Brooks v. Isinghood, 213 W. Va. 675, 690; 584 S. E. 2d 531, 546 (2003) Plaintiff asserts that any error on her part or that of her counsel to identify the proper Defendant within the applicable statute of limitations was not a deliberate strategy. Specifically, Plaintiff has represented to this Court and the Circuit Court that the identity of the instant Defendants was withheld from her by the owner of the real estate. Plaintiff's only option to bring her case, at all, against these Defendants was to file her claims against the persons making the improvements to the real estate as John Doe defendants until the owner could be compelled to identify the instant parties.

The concealment of the identity of these Defendants by the owner of the real estate raises other issues regarding whether the statute of limitations was tolled during the time when the Defendant's identity was concealed. "(T)he general statute of limitations, W. Va. Code, 55-2-12, as amended, is tolled, with respect to an undiscovered wrongdoer, by virtue of the fraudulent concealment or obstruction of prosecution doctrine embodied in W. Va. Code, 55-2-17, as amended, when an action is brought timely against the known wrongdoer(s) and, despite the due diligence of the injured person to discover the identity of all the wrongdoers, the identity of one or more of them is hidden by words or acts constituting affirmative concealment, that is, a "cover-up." Sattler v. Bailey, 184 W. Va. 212,221; 400 S. E. 2d 220,229 (1990) , Clark v. Milam, fn. 11, 872 F. Supp. 307, 312 S.D.W.Va. (1994), Morales v. Robinson, Civil Action No. 2:05-0509 Lexis 25992 S.D. W.Va. (April 6, 2007). "In a case involving a wrongdoer whose identity is affirmatively concealed, the injured person must bring his or her action against such wrongdoer within the statutory period after the injured person discovers, or reasonably should have discovered, that wrongdoer's identity." Id. The owner of the real estate deliberately claimed a lack of knowledge when these parties were obviously known to him. Furthermore, no building permits or environmental permits regarding directing ground water into a stream which would have created a public record regarding the identify of the parties were ever obtained or issued. Plaintiff brought

her claim against these Defendants within one week of discovering their identity.

The Defendants in this case cite and urge this Court to rely upon the holdings of the federal courts regarding the amendment of complaints to add additional parties. This Court has previously given considerable consideration to Defendant's position and has declined to follow such a harsh application. Prior to the 1998 amendments to West Virginia Rule of Civil Procedure, Rule 15, a Plaintiff who sought to add a defendant was required to do so in such a manner as to cause the added defendant to be served with the complaint during the applicable statute of limitations. However, in 1998, this Court found that practice, which followed the federal court rulings regarding Federal Rules of Civil Procedure, Rule 15, was inconsistent with the liberal pleading practices allowed by the West Virginia Rules of Civil Procedure. In modifying Maxwell v. Eastern Associated Coal Corp., 183 W. Va. 70, 394 S. E. 2d 54 (1990), which had followed the previous 1991 version of Rule 15, this Court held, in Brooks v. Isinghood, 213 W. Va. 675, 691; 584 S. E. 2d 531, 547 (2003) that:

> "Rule 15(c)(3) was amended in 1998 and altered *Maxwell*, expanding the time when notice must be received by the party to be added to include " the period provide by Rule 4(k) for service of the summons and complaint(.)" Rule 4(k) provides that service of the summons and complaint be "made upon a defendant within 120 days after the filing of the complaint(.)" *Id.*
>
> "In *Maxwell*, the plaintiffs sued two defendants, but did not serve the original complaint. After the expiration of the statute of limitation, the plaintiff sought

to amend the complaint to add a third defendant. We concluded that the plaintiffs could not, under Rule 15(c), amend their complaint because the newly-added defendants had not received notice of the original action prior to expiration of the stature of limitation. In reaching this decision, we relied on *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), a decision where the court similarly interpreted *Fed. R. Civ. Pro.* Rule 15(c) to require notice to the new defendant prior to the expiration of the statute of limitation." *Id.*

"Because of criticism that *Schiavone v. Fortune* was inconsistent with the liberal pleading practices allowed by the *Rules of Civil Procedure,* in 1991 the federal Rule 15(c) was amended and "revised to change the result in *Schiavone v. Fortune* (.)" *Committee Note to 1991 Amendment.* In West Virginia, the provision allowing notice within 120 days of the filing of the action was added to the language of Rule 15(c) in 1998. The rule change altered the result of decisions such as *Maxwell*– all cases in other jurisdictions just like it– which " reached the paradoxical conclusion that a newly named party to be added by amendment must be notified within the limitations period while, in contrast, a properly named party defendant has no right to be served within the limitations period." *3 Moore's Federal Practice* 3d, § 15.19(3)(e) at 15-93. This modification of the rule achieved the primary goal of Rule 15, which is to ensure that cases and controversies be determined on their merits and not upon legal technicalities or procedural niceties." *Id.*

In addressing when the Defendant must receive notice of the original complaint, this Court stated:

" We therefore hold that under the 1998 amendments to Rule 15(c)(3), before a Plaintiff may amend a complaint to add a new defendant, it must be established that the newly-added defendant (1) received notice of the original action and (2) knew or should have known that, but for a mistake concerning the proper identity of the proper party, the action would have been brought against the newly-added defendant, prior to the running of the statute of limitation or within the period prescribed for service of the summons and complaint, whichever is greater. To the extent that *Maxwell v. Eastern Coal Corp.* conflicts with this holding it is hereby modified." *Id.*

The *Elam* decision relied upon by the Defendant did not address the addition of a new party who claims they had no notice of the action within the statutory time period, but rather whether the claims made in the amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint. In *Elam*, plaintiffs sought to add a bad faith insurance claim against a health care provider's medical malpractice carrier after amendment of the bad faith statute and sought to have the amended complaint relate back to a time before amendment of the statute. Elam v. Med. Assurance of W.Va. Inc., 216 W. Va. 459; 607 S.E. 2d 788, (2004) (per curiam). *Elam* is not on point regarding the case at hand.

CONCLUSION

If the Plaintiff is correct and she has brought her claims against the Defendant during the applicable time frame set forth in W.Va.Code § 55-2-6a, then she has met the requirements for amendment under West Virginia Rule of Civil Procedure, Rule 15(c). If Plaintiff is not correct, then she has been laboring under a mistake of law. If the Plaintiff is laboring under a mistake of law, then she has met the requirements for amendment of her Complaint to add a additional parties defendant under West Virginia Rule of Civil Procedure, Rule 15(c)(3). Furthermore, Plaintiff urges that the statute of limitations was tolled during that period of time when the property owner concealed the identity of these Defendants. And finally, the *Brooks* opinion holds that

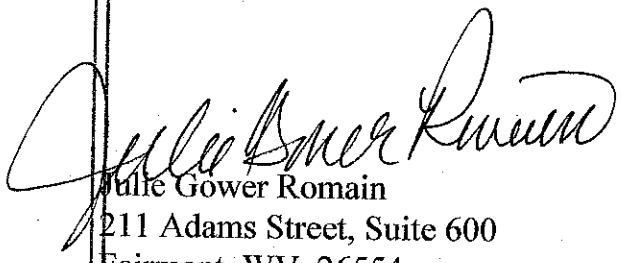
if the Defendant receives notice of the claim within the time for service of the complaint upon the originally named Defendants, as was the case in the instant matter, then the Defendant has received the required notice and the amendment of the Complaint is proper. In the instant case the Defendant received service of the Complaint within 120 days of filing of the original Complaint.

PRAYER FOR RELIEF

Wherefore Plaintiff prays the ruling of the Circuit Court of Grant County, dismissing Plaintiff's Complaint against these Defendants be reversed.

Respectfully submitted,

Linda Muto, Plaintiff,
By counsel,



Julie Gower Romain
211 Adams Street, Suite 600
Fairmont, WV. 26554
WV State Bar ID #5544
Tel: 304-368-1490; Facsimile 304-368-1529

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building and construction.
Defendants.

CERTIFICATE OF SERVICE

I, Julie Gower Romain, counsel for the Plaintiffs, certify that I have this 26th day of September, 2007, served upon counsel for the Defendants a true and accurate copy of: REPLY BRIEF OF GREGORY J. MUTO TO BRIEF OF DEFENDANT LARRY SCOTT, INDIVIDUALLY, AND L. SCOTT LTD. CO. AND LARADO CONSTRUCTION SALES, LLC. by depositing the same in the United States Mail with sufficient postage attached thereto and addressed to:

Michael D. Lorenson
Bowles Rice McDavid Graff & Love LLP
PO Drawer 1419
101 South Queen Street
Martinsburg, WV. 25401

Submitted this 26th day of September, 2007.

JULIE GOWER ROMAIN
WV STATE BAR ID #5544
211 ADAMS STREET, SUITE 600
FAIRMONT, WV. 26554

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TABLE OF AUTHORITIES